## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: January 9, 1997

TO : Rosemary Pye, Regional Director

Region 1

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: SEIU, Local 254 (Brandeis University) 506-4033-9200

Case 1-CB-8835 506-6090-0700

536-5075-5083-2550

This Section 8(b)(1)(A) case was submitted for advice on whether the Union unlawfully removed a shop steward from his position because that steward position was an elected rather than appointed position.

The Union represents a unit of around 110 employees including over 70 Custodial and Groundskeeper employees together with various tradesmen including carpenters, etc. The Union has no written rules regarding the length or service or the number of stewards. It appears that the Union has complete discretion over when to seek nominations for stewards and when to conduct steward elections.

The number of unit stewards historically has varied between two and four stewards, with terms of service varying between one and three years. The Union and the Employer agree that the practice for selecting stewards has been to allow any unit member to nominate anyone for a vacant steward position. If opposing nominations occur, the Union conducts an election. If only one nominee exists, the Union simply appoints that individual to the steward position.

The majority of Custodial employees in the unit appears to be Hispanic. In 1994, a group of Hispanic employees sought to replace their current steward, Mike Connors, with employee Jorge Santana. Connors decided to immediately resign his stewardship. Since there was no other nomination for Conners' now vacant position, the Union appointed Santana as steward in August, 1994. The Union also invited Santana to join the parties' joint Labor Management Committee as a Union representative.

In January 1996, Santana filed a grievance on behalf of nine Custodians who were denied pay for failing to report to work during a snow storm. Santana's grievance alleged that the Employer's policy requiring Custodians to report as

"essential" employees violated the bargaining agreement and was otherwise a new policy. During the Union's investigation of this grievance, however, the Union discovered a 1983 Employer policy substantiating the Employer's position that Custodial employees were "essential" and required to report during a snow storm. The Union also discovered that, even if the Custodial employees had been unaware of their status as "essential" employees, they should have known that the Employer required all employees to call in their absences, even on days when the Employer was "closed" due to weather. The Union nevertheless pursued the grievance with the Employer.

In March 1996, Santana filed an unrelated grievance on behalf of employee DiNunno. Because Santana believed the grievance had not been resolved at the step one level, he filed a step two appeal with the Employer. The applicable bargaining agreement does not explicitly prohibit the filing of step two appeals by stewards. The Union asserts, however, that such appeals are invariably filed by the Local Business Agent. Moreover, grievant DiNunno had been satisfied with the Employer's resolution of his grievance at step one, and had not been aware of Santana's filing of an appeal. DiNunno advised Santana that he wished to withdraw his grievance and the grievance was withdrawn. Union Business Agent Conway at that time intended to discuss with Santana that it was inappropriate for him to have filed a step two appeal. Conway, however, never conducted that discussion with Santana over appropriate grievance filing.

On March 7, the Union sought to collect information to resolve Santana's pending grievance over the snow emergency policy by distributing questionnaires to the nine Custodians who had been denied pay during the snow storm. On March 18, Santana filed a second grievance, apparently on behalf of all the Custodial employees, again complaining about the Employer's snow policy. The Union advised Santana that his second grievance essentially duplicated his first grievance, then still pending, and that there was no evidence to substantiate Santana's allegations that the Employer's policy violated the contract or was a new policy. On March 22, Business Agent Conway wrote a note to Santana stating that "we really need to talk about grievance processing and protocol." However, the Union never held such a discussion. On March 28, Santana filed a step two grievance with the Employer over his second snow policy grievance.

On April 9, Business Agent Conway met with several Custodial employees and three stewards including Santana.

Santana complained that the Employer's snow policy exploited unit Custodial employees to the benefit of the unit Groundskeeper employees. Conway agreed to present that position to the Employer at the step two appeal meeting scheduled for later that day. Conway did present that issue, and the parties agreed to reconvene on April 17th. After that reconvened meeting, the Employer offered to resolve the grievance by making whole the nine grievants. The Employer also offered, in the future, to review each instance of a missed snow day individually, and to work out a clear policy for snow emergencies. On April 19th, the Union advised unit employees of the Employer's grievance settlement offer and requested employees to contact their stewards if they had issues not resolved by that offer.

On May 1, Santana advised both the Employer and the Union that members wanted to continue with the snow emergency grievance because of certain unresolved issues including, inter alia, overtime pay for work as "essential" employees and the definition of "essential." The Employer and the Union agreed, however, that the Employer's offer had settled all outstanding issues including the issues raised by Santana's May 1 notice.

Thereafter, in early May, Conway alleges that she received an anonymous phone call from an employee who was upset because Santana allegedly was holding unit employee meetings in Spanish and was not inviting all employees. Conway alleges that former steward Conners made the same complaint. Conway thereafter advised Santana that she had received complaints about Santana's grievance handling and about his holding unauthorized Union meetings. Santana responded that the Hispanic Custodians had been taken advantage of and had never had a voice before Santana became steward. Conway avers that she then concluded that her relationship with Santana had become "increasingly hostile" and that this could "potentially endanger the membership."

Charging Party Santana admits that he held two lunch hour meetings with subgroups of Custodian employees. However, Santana asserts that he also held several other employee meetings including separate meetings with English, Spanish and Chinese speaking employees.

On May 6, Santana gave Conway two employee petitions. The first petition, signed by 32 Custodians, sought that Ricardo Visquez be named as steward during the day shift. Santana avers that this day shift steward position was open since Santana was the night steward. The second petition,

signed by 38 Custodians, requested that Santana become the Chief Steward. Business Agent Conway received these petitions on behalf of the Union without comment.

Two days later on May 8, Conway notified Santana that she was removing him as steward for several reasons. The following day, the Union received a petition signed by over 60 unit employees demanding a hearing concerning the allegations against Santana. On that day, May 9, the Union notified the Employer and the unit employees that it had removed Santana as steward "due to the serious and potentially harmful problems identified by the membership" and to "ensure that the Union's business is being carried out in accordance with the Local's Constitution and the laws."

We conclude that the Union violated Section 8(b)(1)A) because it removed Santana from an elected steward position in retaliation against his protected internal union activities.

Under Section 7, union members have the right to participate in internal union affairs<sup>2</sup> to question the wisdom of their representative and to attempt to redirect its policies or negotiating strategies.<sup>3</sup> Moreover, there is no legitimate union interest in restricting the free exchange of ideas among the membership.<sup>4</sup> A union, however,

<sup>1</sup> Conway's notice stated that Santana had been guilty of "inappropriate handling of grievances" by, inter alia, failing to consult with a grievant about his appeal; engaging in unauthorized communications with the Employer; holding unauthorized Union meetings with subgroups of employees; failing to invite and include all Union members into meetings; and holding meetings for activities that were injurious to Union members and caused dissension. Conway's notice also stated, with regard to Santana's position on the Labor Management Committee, that Santana had failed to work cooperatively and failed to disclose information.

Shenango Incorporated, 237 NLRB 1355 (1978); Carpenters Local No. 22 (Graziano Construction Co.), 195 NLRB 1 (1972).

<sup>3</sup> Operating Engineers Local 400 (Hilde Construction Co.),
225 NLRB 596, 601 (1976).

<sup>4</sup> Id. at 601-602.

may punish a member for going beyond mere criticism and making statements which reveal an intent to defy a specific course of collective action.  $^5$ 

A union has the right to discipline or remove from office an appointed union official who criticizes, takes a position contrary to, or otherwise does not appear to be loyal to the union hierarchy. Thus, in <a href="Shenango">Shenango</a>, supra, the Board found lawful the removal from a position as a safety committee chairman, a member who had opposed the officers in an internal union election. The Board specifically noted:

The union is legitimately entitled to hostility or displeasure toward dissidence in such positions where teamwork, loyalty, and cooperation are necessary to enable the union to administer the contract and carry out its side of the relationship with the employer. 237 NLRB at 1355.

However, where the union official has been elected to that position rather than appointed, Advice has argued that the union has no right to remove such a member-elected official for having engaged in protected internal union activity.  $^6$ 

Title I of the LMRDA, 29 U.S.C. 411(a)(2), confers upon union members the right to participate freely in the internal affairs of a union, and was "aimed at enlarging protection for members of unions paralleling certain rights guaranteed by the Federal Constitution" in order to further the basic Congressional objective of "ensuring that unions [are] democratically governed and responsive to the will of their memberships." Title VI of the LMRDA, 29 U.S.C. 529, makes it unlawful for a union "to fine, suspend, expel, or

<sup>5</sup> Compare Distillery Workers Local 186 (E & J Gallo Winery, Inc.), 296 NLRB No. 72 (1989) (union discipline lawful where member announced intention to disobey strike decision and sought to persuade others to do same) with Operating Engineers Local 400 (Hilde Construction Co.), supra (union discipline unlawful where members held meeting to discuss whether membership should reconsider strike decision).

<sup>&</sup>lt;sup>6</sup> See, e.g., <u>Steelworkers, Local 4543 (Carol Cable Co., Inc.)</u>, Case 1-CB-7181, Advice Memorandum dated November 5, 1990.

 $<sup>^{7}</sup>$  Finnegan v. Leu, 456 U.S. 431, 435, 436 (1982).

otherwise discipline any of its members" for exercising LMRDA rights. The discharge or removal of union employees for engaging in dissident activity, under certain circumstances, has been found to violate the LMRDA. Thus, in Finnegan v. Leu, 456 U.S. 431, 110 LRRM 2321 (1982), and Sheet Metal Workers v. Lynn, 488 U.S. 347, 130 LRRM 2193 (1989), the Supreme Court distinguished between elected and appointed business agents.

In <u>Finnegan</u>, the Court held that a union's removal of an appointed agent is not violative of Titles I or VI of the LMRDA because the claims of the discharged employees, with whose LMRDA rights the union had interfered, were inconsistent with democratic union governance. Therefore, the LMRDA does not "restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." 456 U.S. at 441.

Subsequently, in Lynn, the Court found unpersuasive the argument that the removal of an elected agent similarly cannot violate the LMRDA. The Court again stressed that a determination whether interference with LMRDA rights gives rise to a Title I violation must be weighed against the statute's basic objective of democratic governance. 488 U.S. at 354. In distinguishing Finnegan, the Court in Lynn observed that when elected officials are removed, "the union members are denied the representative of their choice", and to deprive them of "leadership, knowledge, and advice" during an important time of union policy-making does not constitute "an integral part of ensuring a union administration's responsiveness to the mandate of the union election."8 The Court further held that "the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him." 488 U.S. at 355 (citation omitted). Therefore, a union's retaliatory removal of an elected official states a cause of action under Title I of the LMRDA. Ibid. Federal courts have subsequently applied Lynn to various forms of retaliation against elected union officials who oppose or criticize the union's leadership.9

<sup>&</sup>lt;sup>8</sup> 488 U.S. at 355, quoting Finnegan, 456 U.S. at 441.

<sup>9</sup> See <u>Guzman v. Bevona</u>, 810 F.Supp. 509, 511-12 (S.D.N.Y. 1992) (denial of motion to dismiss LMRDA claim that steward was unlawfully excluded from stewards' meeting where steward

Thus, in the instant case, if it can be shown that Santana occupied an elected steward position, and was removed from that position for internal union dissident activity, there is an LMRDA violation under  $\underline{\text{Lynn}}$  and arguably a resultant Section 8(b)(1)(A) violation.

First, we conclude that Santana occupied an elected rather than an appointed steward position, even though in 1994 the Union "appointed" Santana and no election was held. As noted supra, the Union conducts an election for a vacant steward position where employees nominate more than one candidate for that position. The Union "appoints" a steward only where a single nominee exists obviating the need for a contested election. Thus, the Union "appointed" Santana in the absence of an unnecessary election, in order to effectuate the unit employees' choice of Santana as their steward, and not as the choice of current Union officials. In other words, as the single candidate for the steward position, Santana was "elected" by his fellow unit employees in every sense except form, viz., he was "appointed" in the absence of a contested election. Since the Union's appointment of Santana here was a mere ministerial act, designed to effectuate the choice of the unit employees, we conclude that Santana occupied an "elected" union position.

We also conclude that the Union removed Santana in retaliation against protected internal dissident activity and not because of any alleged misconduct. Initially, we conclude that Business Agent Conway's allegation that she removed Santana for alleged misconduct including "inappropriate handling of grievances" was pretextual. Santana admittedly "failed to consult" with grievant DiNunno about his appeal. However, Santana's assumption that grievant DiNunno wanted an appeal of his grievance was a harmless error which was immediately corrected. Moreover, this occurred in March and was of little concern to the Union at that time. The Union's reference to Santana's alleged "unauthorized communications with the Employer"

contended that he was elected); <u>Duffy v. IBEW Local 134</u>, 780 F.Supp. 1185, 1189 (N.D.Ill. 1991) (same, where union refused to reinstate member to elected executive board position); <u>Stroud v. Senese</u>, 832 F.Supp. 1206, 1212 (N.D.Ill. 1993) (same, involving discharged elected official, stating that after <u>Finnegan</u> and <u>Lynn</u>, LMRDA provides "a cause of action for retaliatory discharge of elected officials, but not for patronage employees, because each affects the democratic process of a union differently").

appears directed at Santana's filing of step-two appeals of grievances. However, the Union had not previously advised Santana that he could not appeal his own grievances, and Santana's filing of the step-two appeals was not prohibited by the bargaining agreement. More importantly, on both occasions the Union intended, but failed, to advise Santana that its usual practice was that step two appeals were filed by the Business Agent rather than by the involved steward. The Union thus also appeared relatively unconcerned with this conduct at that time.

Santana's alleged "unauthorized" meetings with subgroups of employees did not cause "dissension" among the unit. First, the Union did not advise Santana that he was not authorized to meet with unit employees, i.e., that such meetings would be "unauthorized." Nor did the Union advise Santana that he must meet with all unit employees together and could not meet separately with subgroups who spoke different languages. In any event, there is no evidence that Santana's conduct caused dissension in the unit. Rather, his conduct arguably created unity as clearly shown by the overwhelming majority support Santana received from unit employees. In fact, in a unit of over 70 employees, the Union received only two complaints about Santana's alleged misconduct causing dissension. One complaint came from an anonymous source, and the second came from Santana's political rival - the former steward who had resigned in the face of Santana supporters and whom Santana had replaced. In sum, the Union's contention that Santana splintered the unit appears almost wholly without basis. We therefore find the asserted reasons for Santana's removal to have been pretextual.

We then conclude that the Union in fact removed Santana in retaliation against his protected internal union activity. As noted above, Santana's meetings with unit employees did not splinter the unit and did not constitute steward misconduct. The Union in effect removed Santana because he discussed the Employer's snow emergency policy among unit employees after the Union's decision to accept that policy. Santana's critical discussion of the Union's position is protected, dissident internal union activity. In addition, Business Agent Conway removed Santana two days after he had presented Conway with two unit employee petitions. The first petition sought a second Hispanic steward, and the second petition sought Santana's placement into the Chief Steward position. The timing of the Union's removal of Santana directly on the heels of this internal political activity strongly points to the conclusion that

the Union was retaliating against Santana because of his internal union activity. In this regard, we particularly noted that the chief complainant against Santana's alleged creation of "dissension" was Santana's political rival - the non-Hispanic former steward.

In sum, the Region should issue a Section 8(b)(1)(A) complaint, absent settlement, alleging that the Union unlawfully removed Santana from an elected steward position in retaliation against his protected internal union activities.

B.J.K.